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May 15, 2023

The Honorable Miguel Cardona  
Secretary  
U.S. Department of Education  
400 Maryland Ave SW  
Washington, DC 20202

Re: ED-2022-OCR-0143-0001

Dear Secretary Cardona,

I write to offer my comments on the proposed rule “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams”<sup>1</sup>, issued by the U.S. Department of Education (Department) on April 13, 2023. The issue of inclusion of all students on sports teams consistent with their gender identities has been the subject of reactionary policymaking in both the several states and in Congress. This is resulting in the introduction of bills and laws that demonize transgender youth, which makes your efforts take the time necessary to talk to all relevant stakeholders before issuance of a rule commendable.

I believe the proposed rule is a strong foundation on which a final rule can be built. To that end, I believe the final rule should incorporate concepts and text from the proposed rule’s preamble. Absent these additions, I fear the rule as proposed could be subject to interpretations vastly different from those expressed in the preamble by succeeding administrations. While the text of the rule could remain unchanged, contrary guidance could deny many students rights under Title IX that I firmly believe you intend to reflected in this rule.

Further, the final rule, and any guidance issued in support of it, should be issued in full awareness of the current political landscape in the country when it comes to issues involving transgender people generally, and transgender youth specifically. We have seen increasing hostility expressed towards this community filtering into public policy. The response to this rule

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<sup>1</sup> 88 Fed. Reg. 22860, Apr. 13, 2023 (to be codified at 34 C.F.R. pt. 106) [hereinafter 2023 Title IX NPRM].

by some local and state entities will be tinged with this rhetoric, and the final rule should provide guidance to the Office for Civil Rights on how to interpret attempts by school districts and institutions of higher education to whitewash harmful rhetoric into anodyne proposals. Finally, while recipients of educational funds may develop policies consistent with the standard set forth in this rule, local enforcement of that standard will likely present many challenges. I worry that a final rule on this issue, even after it withstands legal scrutiny, will result in a mishmash of policies and standards based on less on civil rights, but custom and practice in different localities, states, and regions. That is not how our civil rights laws have traditionally been administered in this country, and the Department should take this into account in development of a final rule.

*Incorporation of preamble concepts into the final rule*

The background to the proposed includes a number of determinations and statements that would greatly impact enforcement of the rule. The Department should consider incorporation of these statements into the final rule. These include:

**Blanket bans violate Title IX.**<sup>2</sup> Many states have already implemented blanket bans, and the House considered a blanket ban targeting trans women and girls just last month.<sup>3</sup> While the preamble is clear that such a policy enacted on a state level would violate the rule, that clarity should be expressed in the language of the final rule itself.

**Specific harms to transgender students from exclusion.**<sup>4</sup> The final rule should recognize that the harm that comes to a transgender student from exclusion from a team consistent with their gender identity is not the same as being cut from a team for other reasons, and it is not a *de minimis* harm.

**The need for legitimate educational interests to justify exclusion.**<sup>5</sup> Based on the proliferation of state and federal bills targeting the transgender community, the final rule should emphasize that an important educational objective cannot be mere window dressing for actions a state or locality may have attempted to take before the final rule went into effect. This last point is necessary given the state of current attempts to craft policies throughout the country that are blatantly discriminatory against transgender youth.

*The current landscape for trans youth*

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<sup>2</sup> *Id.* at 22873 (“Criteria that categorically exclude all transgender girls and women from participating on any female athletic teams, for example, would not satisfy the proposed regulation because, in taking a one-size-fits-all approach, they rely on overbroad generalizations that do not account for the nature of particular sports, the level of competition at issue, and the grade or education level of students to which they apply”).

<sup>3</sup> H.R. 734, 118<sup>th</sup> Cong. (2023).

<sup>4</sup> *Id.* at 22871 (identifying “additional, specific harms to transgender students from being excluded from team participation consistent with their gender identity” including the effect of outing, undermining of social transition, and the possibility of embarrassment, harassment, and invasion of privacy from having to verify one’s sex).

<sup>5</sup> *Id.* at 22872 (The Department notes that a recipient could not satisfy the proposed regulation’s requirement that criteria be substantially related to achieving an important educational objective if its objective is communicating or codifying disapproval of a student or a student’s gender identity...An asserted purpose also would not satisfy the proposed regulation if, rather than being a genuine educational objective of the recipient, it is a pretext for an impermissible interest in singling out transgender students for disapproval or harm.)

Transgender youth are a tiny fraction of the youth population in this country, and an even smaller fraction of that already small population are involved in athletics.<sup>6</sup> It appears there are only 35 documented instances of out trans athletes competing at the collegiate level.<sup>7</sup> To suggest that the participation of 35 women athletes among the approximately 110,000 women athletes that compete yearly in college sports somehow justifies calls we have heard on both the state and federal level for a complete blanket ban of transgender participation in youth sports is absurd. Experts in the field of genetics, science, and sport have stated that discrimination against transgender student athletes is not based on science.<sup>8</sup> Additionally, participation in sports has significant benefits for transgender students including higher academic performance and lower rates of depression and suicidality.<sup>9</sup>

This is especially true as we know transgender youth are currently experiencing challenges to nothing less than their right to exist. Federal and state efforts targeting transgender participation in sports are just some of the many proposals that collectively aim to ostracize trans youth and trans individuals from the public arena.<sup>10</sup> Research shows that due to stigma, trans youth experience depression and suicidal ideation at disproportionate rates compared to their peers.<sup>11</sup> Recent data from the CDC show that transgender youth are 10 times more likely to experience homelessness.<sup>12</sup> Transgender students are also more likely to feel unsafe at school, to experience bullying and other forms of violence including being threatened with a weapon at school, and social isolation. Experiences of a hostile school climate, potentially compounded by an unstable

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<sup>6</sup> Based on questionnaire data collected by the Centers for Disease Control and Prevention as part of the 2017 Youth Risk Behavior Survey conducted in 10 U.S. states and 9 large urban school districts. The survey defined “transgender” individuals as those whose gender identity does not align with their sex. “Across the 19 sites, 94.4% (range = 94.0%–94.8%) of students responded “No, I am not transgender”; 1.8% (range = 1.0%–3.3%) responded “Yes, I am transgender”; 1.6% (range = 0.9%–2.5%) responded “I am not sure if I am transgender”; and 2.1% (range = 1.5%–4.7%) responded “I do not know what this question is asking.” Ctrs. for Disease Control & Prevention, *Morbidity and Mortality Weekly Report: Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students — 19 States and Large Urban School Districts, 2017*, (Jan. 25, 2019), <https://www.cdc.gov/mmwr/volumes/68/wr/mm6803a3.htm>.

<sup>7</sup> Cyd Zeigler & Karleigh Webb, *These 35 trans athletes have competed openly in college*, *Outsports*, Mar. 29, 2023, <https://www.outsports.com/trans/2022/1/7/22850789/trans-athletes-college-ncaa-lia-thomas> (“Outsports knows there are countless other trans athletes who have competed at the collegiate level who have not been publicly out or out to teammates.”).

<sup>8</sup> Tinbete Ermyas & Kira Wakeham, *Wave of Bills to Block trans Athletes Has No Basis In Science, Researcher Says*, *NPR*, Mar. 18, 2021, <https://www.npr.org/2021/03/18/978716732/wave-of-new-bills-say-trans-athletes-have-an-unfair-edge-what-does-the-science-s>.

<sup>9</sup> Jamie Schultz, *Title IX at 50: A Critical Celebration*, 30 *Women in Sport & Physical Activity J.*, 97, 101 (2022).

<sup>10</sup> A Congress.gov search of “biological sex”, a term known not to be inclusive of the LGBTQ+ community was used in least eight bills introduced in the 117<sup>th</sup> Congress, including H.R. 8731, *Protect Children’s Innocence Act*, H.R. 8171, *Protect Minors from Medical Malpractice Act of 2022*, and H.R. 1926 *Protecting Children From Experimentation Act of 2021*. <https://www.congress.gov/quick-search/legislation?wordsPhrases=%22biological+sex%22&wordVariants=on&congressGroups%5B%5D=0&congresses%5B%5D=117&legislationNumbers=&legislativeAction=&sponsor=on&representative=&senator=>.

<sup>11</sup> Brooke Migdon, *Transgender Children Are More Likely to Face Mental Health Challenges, Study Says*, *The Hill*, Jul. 22, 2022, <https://thehill.com/changing-america/well-being/mental-health/3570956-transgender-children-are-more-likely-to-face-mental-health-challenges-study-says/>.

<sup>12</sup> Carolyn Jones, *Transgender Youth Almost 10 Times More Likely to be Homeless as Their Peers, Data Shows*, *EDSource*, June 7, 2021, <https://edsources.org/updates/transgender-youth-almost-10-times-more-likely-to-be-homeless-as-their-peers-data-shows>.

living situation, lead to disproportionate drop out rates for these students.<sup>13</sup> Around the country we see organized attacks against these students. In the first three months of 2023, more than 380 anti-transgender state bills have been introduced, including a bill in Florida that would remove transgender children from their homes if their parents support and affirm them.<sup>14</sup>

Bills targeting curriculum inclusion, often referenced as "Don't Say Gay" bills, censor teacher's speech by prohibiting mention of LGBTQ people or gender diversity in their classrooms. The American Library Association reports that attempts to ban books in schools are up four-fold with the top three most banned books addressing themes of transgender identity or gender non-conformity.<sup>15</sup> Twenty states now prohibit transgender students from participating in school sports aligned with their gender.<sup>16</sup> The focus of these coordinated attacks was made all the more clear in early March 2023, when a speaker announced from the Conservative Political Action Conference stage that "transgenderism must be eradicated from public life entirely."<sup>17</sup> The Department has a moral obligation to protect the rights of all students, and the efforts to enforce this rule must be done in full recognition of the coordinated policy response being launched against transgender children across the country.

#### *Enforcement of standards in competition*

Finally, the Department recognizes that the proposed rule would govern all recipients of funding normally subject to Title IX. By proposing each recipient make their own determination on the use of sex related criteria, we risk creating a system where a federal law's enforcement is subject to widely varying interpretations from school to school, let alone school district to school district or state to state. Even worse, many of the associations that govern interscholastic athletic competition in the United States are not recipients of federal funds themselves and are not subject to Title IX. While their constituent members may be subject to Title IX, if each is allowed to set their own standards on the usage of sex-related criteria to limit participation, there will not be one uniform standard to govern a particular sport, at a particular level of competition, at a particular age or grade level.

A high school or school district should be able to rely on the regulations of the authority that governs athletics within its jurisdiction without opening itself up to a potential Title IX violation. As such while the proposed rule allows for every recipient to create their own standards, the Department should recognize that there will be a need for standards at the state level (and most

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<sup>13</sup> U.S. Dep't. of Health and Hum. Svcs., Off. of Disease Prevention and Health Promotion, Social Determinants of Health Summaries: Graduation, <https://health.gov/healthypeople/priority-areas/social-determinants-health/literature-summaries/high-school-graduation>.

<sup>14</sup> James Factora, *Florida Lawmakers Proposed Allowing Trans Kids to be Removed from Supportive Parents*, Them, Mar. 8, 2023, <https://www.them.us/story/florida-bill-trans-kids-supportive-parents>.

<sup>15</sup> Miranda Mazariegos & Meghan Collins Sullivan, *Efforts to Ban Books Jumped an 'Unprecedented' Four-fold in 2021, ALA Report Says*, NPR, Apr. 4, 2022, <https://www.npr.org/2022/04/04/1090067026/efforts-to-ban-books-jumped-an-unprecedented-four-fold-in-2021-ala-report-says>.

<sup>16</sup> Movement Advancement Project, "Bans on Transgender Youth Participation on Sports", [https://www.lgbtmap.org/equality-maps/sports\\_participation\\_bans](https://www.lgbtmap.org/equality-maps/sports_participation_bans), (last visited, April 7, 2023).

<sup>17</sup> Diana Goetsch, Opinion: *What the CPAC Speaker Meant When He Said 'Transgenderism Must Be Eradicated'*, L.A. Times, Mar. 8, 2023, <https://www.latimes.com/opinion/story/2023-03-08/transgender-cpac-michael-knowles-rolling-stone-ron-desantis>.

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likely at the school district level) in K-12 athletics, and at the regional conference (or most likely the national association level) for university athletics.

There is also concern that a policy that passes muster with the Department may be enforced in a way that violates the rule, and could implicate other civil rights laws. Specifically, research has shown that black cisgender female athletes face heightened scrutiny of their gender and bodies.<sup>18</sup> The Department needs to ensure that enforcement of policies related to sex-related criteria does not violate Title VI of the *Civil Rights Act of 1964* by discriminating on the basis of race.

I thank you for the chance to offer my thoughts on this proposed rule, and I am sure the finalized rule will protect the rights of all students to access athletics in educational programs free from discrimination on the basis of sex, recognizing the intent of the law first established fifty years ago.

Sincerely,



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**ROBERT C. "BOBBY" SCOTT**

Ranking Member

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<sup>18</sup> E.g., Katherine Fominykh, *New study from Morgan State how black female athletes navigate racism and sexism to excel*, The Baltimore Sun, Jun. 27, 2018, <https://www.baltimoresun.com/sports/bs-sp-morgan-state-black-female-athlete-study-20180625-story.html>.